BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GLYNDA HENDERSON	)	
Claimant	)	
VS.	)	
	)	
RUSSELL STOVER CANDIES	)	Docket No. 258,498
Respondent	)	
	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the July 16, 2012, Review & Modification Award entered by Administrative Law Judge (ALJ) Rebecca Sanders. The Workers Compensation Board heard oral argument on November 6, 2012.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for claimant. Brenden W. Webb of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board is listed in the Review & Modification Award. At oral argument, the parties stipulated the record shall also include the record considered by the ALJ in the original Award and the September 20, 2004, review and modification Award. Respondent also indicated at oral argument that it is not contesting that part of the ALJ's July 16, 2012, Review & Modification Award that determined claimant was entitled to medical expenses and unauthorized medical expenses, if any.

ISSUES

This is a review and modification proceeding. The original Award in this claim was entered on December 19, 2002. That Award stemmed from work-related left ankle and

right knee injuries sustained by claimant on March 28, 2000. In the July 16, 2012, Review & Modification Award, ALJ Sanders determined claimant was not entitled to modification of her award based on permanent total disability, but she was entitled to modification of her award based on an increase in task loss (to 66%) resulting in an 83% work disability (when averaged with claimant's 100% wage loss). The ALJ found the application for review and modification was filed on October 22, 2009, and the modification was appropriate from and after April 25, 2009. ALJ Sanders awarded claimant an additional 10.12 weeks of permanent partial disability benefits.

Claimant contends she is permanently and totally disabled and requests modification of her award based on permanent total disability. In the alternative, claimant alleges she has a 100% wage loss and a 100% task loss for a 100% work disability.

Respondent requests the Board uphold the July 16, 2012, Review & Modification Award. Respondent submits any increase to the award in this matter must be limited to any increased disability with regard to claimant's right knee and left ankle and, further, claimant is not permanently and totally disabled because of her injuries to her right knee and left ankle.

The issues before the Board on this appeal are:

1. Is claimant permanently and totally disabled as a result of her March 28, 2000, accident?

2. If not, does K.S.A. 1999 Supp. 44-510e(a)(3) bar claimant from seeking review and modification of her permanent partial disability benefits?

FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the Board finds:

Claimant sustained work-related left ankle and right knee injuries on March 28, 2000, her first day of work. Claimant underwent left ankle and right knee surgeries. She continued working for respondent in an accommodated job, except during the periods she was recuperating from the surgeries. The accommodated job involved opening boxes of candy, separating good candy from bad candy and measuring ingredients for mixing candy, which was repetitive work using her hands. As a result, claimant developed right carpal tunnel syndrome. In March or April 2002, claimant underwent a right carpal tunnel release. On January 21, 2002, claimant was discharged because respondent could no longer accommodate her restrictions. Claimant has not worked since.

In the original Award, which was entered on December 19, 2002, ALJ Bryce D. Benedict determined claimant sustained permanent functional impairments to both lower extremities, which were combined for an 11% whole body impairment. The ALJ further

found claimant sustained a 100% wage loss and a 39% task loss and averaged those for a 69.5% work disability. Respondent appealed the December 19, 2002, Award to the Board. In an August 28, 2003, Order, the Board modified ALJ Benedict's Award by finding claimant did not make a good faith effort to find work until September 17, 2002. Consequently, claimant's permanent partial disability payments based upon work disability did not commence until that date. The Board's Order was appealed to the Kansas Court of Appeals, which affirmed the Board's Order.

Claimant's application for review and modification filed on October 22, 2009, asserted claimant's "condition has worsened to the point [she is] permanently and totally disabled."

As a result of the original accident and after the original Award was entered, claimant has had two additional surgeries to fuse the bones in her left foot. She then had her right knee replaced in January 2010, and the left knee replaced in October 2011. According to claimant, the left knee condition was caused by limping, which resulted from the right knee and left ankle injuries. Claimant's left ankle and right knee surgeries were paid for by respondent.

Since 2003, claimant has been receiving Social Security disability benefits. At the time of the March 15, 2012, review and modification hearing, claimant resided in Aurora, Colorado, a city with a population of approximately 500,000. Claimant has not sought employment since around 2003. At the March 2012 hearing, claimant was 60 years of age and has a high school education with a year or so of college. In the 15 years prior to her March 2000 accident, claimant held two other jobs. From 1997 through 1999, claimant worked for Divine Enterprises. Her job title was Billing/Supervisor. From 1981 through 1997, claimant worked for IBM. She held the job titles of an assembler, senior assembler, lead assembler, test technician, associate program support representative and software librarian.

Claimant testified that since 2003, her overall physical condition has worsened. She has pain and swelling in both knees and her left ankle. Claimant testified that she used to be very active walking, exercising and riding bikes, but can no longer participate in those activities. After sitting for 15 minutes, claimant must get up and change positions. When claimant gets up from a sitting position, she has difficulty rising. She limps and walks close to walls so that she can use the walls as a support. During the day, claimant lies down at times and elevates her feet. Claimant wears a shoe on her left foot that is one size larger than the shoe she wears on the right foot.

At the request of her attorney, claimant was evaluated on June 28, 2011, by Dr. Daniel D. Zimmerman, an internal medicine physician certified as an independent medical examiner. He took a history from claimant and physically examined her. He also reviewed extensive medical records of claimant dating back to her 2000 accident. Dr. Zimmerman x-rayed claimant's left ankle and both knees. Claimant's chief complaints

were pain and discomfort affecting the right hand and wrist, right knee, left ankle, and consequential pain and discomfort affecting the left knee. Claimant takes Celebrex on a daily basis and uses Lidoderm patches once or twice a week for pain.

Dr. Zimmerman indicated claimant's right knee replacement was well seated. The x-rays of the left ankle demonstrated claimant had a triple arthrodesis, and extensive osteoarthritis in the mid left foot beyond the arthrodesis. Claimant had severe range of motion restrictions affecting the left knee. The x-rays of the left knee showed extensive osteoarthritis and chondromalacia change. Dr. Zimmerman opined this was the result of the trauma on March 28, 2000, affecting the right knee and left ankle. He also noted claimant had range of motion restrictions to the right wrist as a result of residuals from her carpal tunnel syndrome and ulnar nerve entrapment at Guyon's canal. She had pain and discomfort in the right wrist and hand as well as sensory change in the digits innervated by the median nerve.

Dr. Zimmerman gave claimant the following permanent restrictions: (1) lifting no more than 10 pounds on an occasional basis and no more than 5 pounds on a frequent basis; (2) avoid frequent flexion, extension, twisting, torquing, pushing, pulling, hammering, handling, holding, and reaching activities using the right upper extremity and (3) no bending, stooping, squatting, crawling, kneeling or twisting the lower extremities. When asked what injures necessitated the foregoing restrictions, Dr. Zimmerman testified that all of claimant's injuries necessitated restriction #1, her carpal tunnel syndrome necessitated restriction #2, and her bilateral knee and left ankle and foot injuries necessitated restriction #3.

Dr. Zimmerman determined claimant had a 21% functional impairment to the right upper extremity, 75% for the right knee and 49% for the left ankle. He did not rate claimant's left knee as she was contemplating left knee arthroplasty. Dr. Zimmerman opined that claimant lost the ability to perform all 27 job tasks she performed in the 15 years before her accident, as identified by vocational expert Bud Langston. The doctor testified there were no sedentary jobs that claimant could perform. Dr. Zimmerman indicated that because of the restrictions he placed on her, claimant was incapable of finding work in the open labor market. He testified if claimant's hands were taken out of the equation, she could perform some clerical jobs.

Vocational rehabilitation consultant Bud Langston testified on behalf of claimant. He personally met with claimant on May 28, 2002, for the purpose of performing a job analysis. That was the last time Mr. Langston has had contact with claimant. Mr. Langston testified he did not know where claimant currently resided. Claimant had a high school education. He did not contact claimant's former employers and relied on claimant's personal recollection as to what tasks she performed and the frequency that she performed them.

Mr. Langston acknowledged there are always more jobs in a metropolitan area. The morning of his deposition, Mr. Langston was asked to review the report of Dr. Zimmerman. Based on Dr. Zimmerman's restrictions, Mr. Langston indicated claimant would have to perform unskilled sedentary work. He testified that only 2.6% of all jobs are in the unskilled sedentary classification and use of the bilateral upper extremities is required. Mr. Langston opined claimant was unemployable.

Respondent had claimant evaluated on June 28, 2011, by Dr. Michael J. Poppa, board certified in occupational and preventive medicine. Coincidentally, June 28, 2011, is the same day claimant was evaluated by Dr. Zimmerman. Dr. Poppa took a history from claimant and physically examined her. He also reviewed extensive medical records of claimant dating back to her 2000 accident. Dr. Poppa did not order any additional diagnostic tests. Claimant reported constant pain, with standing, sitting or getting up from a seated position being quite laborious. She indicated that her left ankle was not flexible and she walked with a limp because of the right knee.

Dr. Poppa indicated claimant's right knee range of motion involving extension was normal to zero degrees. Her right ankle range of motion was limited as was her left ankle range of motion. He observed that claimant walked with an antalgic gait. Dr. Poppa's diagnoses of claimant's right knee were contusion, sprain, lateral meniscus tear and significant preexisting degenerative osteoarthritis with chondromalacia. He diagnosed claimant with a left ankle sprain and left ankle significant preexisting osteoarthritis. In Dr. Poppa's opinion, claimant sustained a 12% right knee functional impairment and a 10% functional impairment for the left ankle that were attributable to her March 28, 2000, work injury.

Dr. Poppa indicated claimant could perform sedentary work which involves exerting up to 10 pounds of force occasionally, as well as lifting, carrying, pushing, pulling or otherwise moving objects on an occasional basis. He described sedentary work as also involving sitting most of the time, but may involve occasionally walking or standing. He believed claimant could perform sedentary work in the open labor market. Dr. Poppa opined that claimant lost the ability to perform 12 of 23 job tasks claimant performed in the 15 years before her accident, as identified by vocational expert Steve Benjamin, for a 52% task loss. This appears to be an error as Mr. Benjamin, as noted below, testified he identified 38 non-duplicative tasks.

When Dr. Poppa evaluated claimant, he had her complete a history intake form. In the review of systems section of the history intake form where claimant was asked what body parts were injured at the time of this injury, she listed the right knee and left foot. Under surgical history, claimant listed no left knee surgeries.[1] Under previous work injuries, no left knee injury was noted. Consequently, Dr. Poppa did not examine the left

[1] Claimant's left knee replacement was performed in October 2011.

knee. Dr. Poppa acknowledged that on his history intake form, claimant had indicated that when walking, her left knee became symptomatic. On cross-examination, Dr. Poppa indicated that his restrictions were based solely on claimant's left ankle and right knee conditions. He did not consider claimant's left knee condition or her right carpal tunnel syndrome, as she made no complaints about her left knee or upper extremities.

At respondent's request, vocational expert Steve Benjamin performed a task analysis of claimant's job tasks. He interviewed claimant by telephone on July 20, 2011. Mr. Benjamin reviewed medical reports from Dr. Stewart K. Weinerman dated May 30, 2007; Dr. Robert P. Bruce dated February 6, 2002; and Dr. Poppa dated June 28, 2011. The reports of Drs. Bruce and Poppa are in evidence, but not the report of Dr. Weinerman. Claimant objected to any of the doctors' reports that were hearsay. Mr. Benjamin prepared a task analysis report dated July 29, 2011, but did not receive Dr. Poppa's report until April 25, 2012, the date Mr. Benjamin was deposed. Mr. Benjamin testified that in the 15 years prior to her March 28, 2000, accident, claimant performed 38 non-duplicative job tasks.

Mr. Benjamin opined claimant could obtain employment in the open labor market. That would be true whether the restrictions of Drs. Bruce, Weinerman or Poppa are utilized. Mr. Benjamin felt claimant could perform jobs at the sedentary level and gave examples of five jobs she could perform. The five jobs were billing clerk, data entry clerk, office cashier, order clerk and receptionist. Using the Colorado Wage Survey, Mr. Benjamin opined claimant could earn $420.24 a week.

Mr. Benjamin admitted that he did not know how much difficulty claimant had getting out of a chair. He also indicated that he testifies as an expert in Social Security disability cases. In those cases, if a person must change from a seated to a standing position more than every 15 to 20 minutes, Mr. Benjamin would testify no work would be available for that person because of concentration issues. He also testified that the only information he generally knew about claimant, other than her restrictions, was that she had a high school education. Mr. Benjamin was not asked to review Dr. Zimmerman's restrictions nor asked to give an opinion based on Dr. Zimmerman's restrictions.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 1999 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 1999 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his or her right to an award for compensation by proving all the various conditions on which his or her right to a recovery depends. This must be established by a preponderance of the credible evidence.[2]

The first issue before the Board is whether claimant is now permanently and totally disabled. K.S.A. 44-510c(a)(2) (Furse 1993) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

Because claimant sustained bilateral lower extremity injuries that resulted in a permanent impairment, the Board finds there is a presumption that claimant is permanently and totally disabled. See *Casco*.[3] The question then becomes whether respondent rebutted that presumption.

Drs. Zimmerman and Poppa evaluated claimant on the same day, but came up with divergent opinions. Dr. Zimmerman opined claimant's left knee condition indirectly resulted from her March 2000 work-related accident. He also opined that claimant's carpal tunnel syndrome combined with her left ankle and bilateral knee injuries made claimant permanently and totally disabled. Dr. Poppa was not aware claimant had sustained left knee or right upper extremity injuries and felt claimant was employable. Their opinions on task loss also dramatically differed.

Claimant relies on the opinions of Dr. Zimmerman and Mr. Langston. Dr. Zimmerman examined claimant before her left knee replacement. Despite the fact that she had not yet had left knee surgery, he assigned claimant permanent restrictions based in part upon the condition of claimant's left knee on the date of the evaluation. Mr. Langston's opinion carries little weight. After not communicating with claimant in approximately 10 years, Mr. Langston was placed in the unenviable position of being asked to opine whether claimant was permanently and totally disabled. He was also unaware claimant moved from Abilene, Kansas, to Aurora, Colorado, where 500,000 people reside and more jobs are available.

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[2] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[3] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

Mr. Benjamin's opinions are the most credible of the four experts who testified. He personally interviewed claimant in July 2011. He took into consideration claimant's age, education and transferrable job skills. Mr. Benjamin was aware claimant had moved to Aurora, Colorado. He testified that he used the OASYS Job Matching System, which is a transferrable skills analysis computer program that links the Dictionary of Occupational Titles to the Census Bureau and employment data. He also used the Colorado Wage Survey, because claimant had moved to Colorado. Finally, Mr. Benjamin identified several jobs claimant could still perform and the approximate weekly wages she could earn.

Taking into consideration all the circumstances surrounding claimant's condition, including the permanent nature of her injuries, her age, education and transferrable job skills, the Board finds claimant is not permanently and totally disabled.

Claimant's original accident was on March 28, 2000. More than 415 weeks have passed since claimant was discharged by respondent on January 21, 2002. If claimant is not permanently and totally disabled, the Board does not have jurisdiction to modify claimant's permanent partial disability.

In *Camp*,[4] the Kansas Court of Appeals upheld a Board finding that K.S.A. 44-510e(a)(3) limited compensation available to Camp in a review and modification proceeding to 415 weeks following the date of injury. The Court in *Camp* stated, "Thus, the Board did not err in Docket No. 1,001,697 when it held that K.S.A. 44-510e(a)(3) operated as a statute of limitations, which limited Camp's receipt of benefits upon review and modification to 415 weeks from the date of the original accident." Here, claimant's original accident was on March 28, 2000. More than 415 weeks passed from that date until claimant filed her application for review and modification on October 22, 2009. Pursuant to *Camp*, the Board finds that claimant is barred by K.S.A. 1999 Supp. 44-510e(a)(3) from seeking a review and modification of her permanent partial disability benefits.

CONCLUSION

1. Claimant failed to prove by a preponderance of the evidence that she is permanently and totally disabled as a result of her March 28, 2000, accident.

2. K.S.A. 1999 Supp. 44-510e(a)(3) bars claimant from seeking review and modification of her permanent partial disability benefits.

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[4] *Camp v. Bourbon County*, No. 104,784, 2012 WL 3135512 (Kansas Court of Appeals unpublished opinion filed July 27, 2012; *pet. for rev.* filed Aug. 24, 2012).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[5] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms those parts of the July 16, 2012, Review & Modification Award entered by ALJ Sanders that determined claimant was not permanently and totally disabled and that future medical will be considered upon proper application. The Board reverses that part of the July 16, 2012, Review & Modification Award entered by ALJ Sanders that found claimant was entitled to an additional 10.12 weeks of permanent partial disability benefits because K.S.A. 1999 Supp. 44-510e(a)(3) bars claimant from seeking a modification of her permanent partial disability benefits. Respondent shall pay claimant's related medical expenses and unauthorized medical expenses, if any.

IT IS SO ORDERED.

Dated this ____ day of February, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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[5] K.S.A. 2011 Supp. 44-555c(k).